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COA # 26683-4

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent

v.

MITEL H. PATEL,

Appellant

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BRIEF OF RESPONDENT

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

(1) The trial court erred by denying defendant's motion to suppress verbatim transcripts of defendant's instant messaging conversations with Detective Keller.

(2) The trial court erred by denying defendant's motion to dismiss for failure to prove an essential element of the offense.

II.

ISSUES PRESENTED

(1) Does a person have a privacy interest in the use of a borrowed computer that is set to record instant messaging communications?

(2) Was the decision in *State v. Townsend* correctly decided?

(3) Did the evidence support the bench verdict?

III.

STATEMENT OF THE CASE

Defendant/appellant Mitel Patel was charged in the Spokane County Superior Court with one count of attempted second degree child

rape. CP 1. It was alleged that he set up a liaison with a police detective posing as a thirteen-year-old girl. CP 2-3.

Defendant moved to suppress the print out of his on-line instant messaging conversations with the child. The matter was heard by the Honorable Gregory Sypolt. Defendant claimed that he did not know the information was being recorded. MRP 30-35.<sup>1</sup> His counsel argued that his ignorance of the workings of the computer, which belonged to his roommate, took the case outside of the consent to recording analysis of State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002). MRP 38-42. Judge Sypolt rejected the argument, concluding that defendant implicitly consented to the recording. MRP 48-50; CP 6-7.

The matter was assigned to the Honorable Robert Austin for trial. RP 1 *et seq.* Defendant waived his right to a jury trial, so the matter proceeded to bench trial before Judge. Austin. RP 1-3. The first witness was a detective from the Spokane Police Department, Jerry Keller. RP 5-92. Keller testified to running sting operations on the internet looking for sexual predators.<sup>2</sup> To that end, he maintains a profile of a fictitious young girl and

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<sup>1</sup> MRP will be used to denote the transcription of the October 12, 2005, motion hearing before Judge Sypolt. RP will denote the transcription of proceedings before Judge Austin.

<sup>2</sup> Detective Keller also was the officer involved in State v. Townsend, *supra*.

then engages in on-line conversations with people who contact that profile.  
RP 6-10.

On November 30, 2004, Keller was in the office when his current profile, "Kimberleyanne420," received a message from "Rob Corey A" at 7:32 a.m. The detective responded "hello" and was immediately asked, "you like older guys?" RP 10. When asked how old he was, "Rob" identified himself as 26. The detective responded, "Wow, I'm 13 but look and act older." RP 10; CP 17.<sup>3</sup> The conversation then immediately turned to sex. RP 13-21; CP 17-19. Defendant e-mailed a picture of himself to "Kim." RP 19.

The on-line conversation was interrupted when defendant had to go to a job. It picked up again at 10:47 a.m. when he returned. RP 22; CP 20. The conversation soon returned to a sexual theme with the defendant indicating he wanted to have sex with her. RP 22-23; CP 20. The conversation ended while the two waited for (fictitious) Kim's (fictitious) mother to leave. RP 27; CP 21. At that point the detective arranged for use of an apartment and a surveillance team to watch the apartment complex. RP 28-29.

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<sup>3</sup> The printout of the screen conversation, admitted as exhibit 2 at trial (RP 12), does not appear to have been designated for transmission to this court. However, the printout is also attached to the trial court's findings of fact and references to the document by that pagination will be used here.

Defendant contacted Kimberleyanne420 a third time at 12:35. By this time Keller had moved over to the apartment location, so a different officer played the role of Kimberley. RP 29-30; CP 22. Defendant received directions to the apartment. RP 31-32; CP 22. Another detective videotaped the defendant arriving at the scene and walking to the apartment. RP 93-97. There he knocked on the door, identified himself as Mitel, and asked for Kim. The door was opened and defendant was arrested. A search incident to the arrest found directions to the apartment and five condoms. RP 33-35.

Defendant was shown a printout of the internet chat. He initialed each page and agreed the document was accurate. RP 39-40. During his interview, he stated that he was ashamed because Kim was 13. RP 40. Defendant's computer was analyzed by a specialist and found to contain the same chat as that recorded by detective Keller's computer. RP 105-110.

Defendant testified on his own behalf. He believed he was going to meet a 16 or 17 year-old girl. He did not remember that she claimed to be 13. He hoped to buy marijuana and was ready to have sex if that developed. He explained his conversation with "Kim" as simply being "cyber sex." RP 152-174, 177-182, 189-192, 201-203.

Defense counsel argued the case consistent with his client's testimony that he did not realize "Kim" was 13 and that other evidence suggested she was older. RP 223-233. Judge Austin disagreed, finding defendant guilty beyond a reasonable doubt. In his view the defendant's actions showed a substantial step towards having sexual intercourse with someone he believed was 13. RP 235-238. Written findings in support of that conclusion were subsequently entered. CP 14-22.

Defendant was given a SSOSA sentence. CP 23-35. He appealed directly to this court. CP 36-49.

#### IV.

#### ARGUMENT

#### ^A. DEFENDANT DID NOT HAVE A RIGHT OF PRIVACY IN ON-LINE COMPUTER COMMUNICATIONS CONDUCTED ON ANOTHER PERSON'S COMPUTER.

The initial issue presented in this appeal is whether or not the Privacy Act, RCW 9.73, was violated by detective Keller's computer recording the on-line instant messaging communications with the defendant. Defendant's efforts to distinguish this court's prior decision in State v. Townsend, supra, should be rejected. To the extent the distinctions have any merit, this court ought to reconsider that portion of the Townsend opinion.

In Townsend this court ruled that instant messaging and e-mail communications are private conversations within the meaning of the Act. 147 Wn.2d at 674.<sup>4</sup> The majority<sup>5</sup> also rejected the State's argument that the Act did not apply to communications between two recording devices and that there must, instead, be an interception or recording by a different device.<sup>6</sup> Id. at 674-675. The majority<sup>7</sup> also found that defendant consented to the recording. As to e-mails, the court noted that "in order for e-mail to be useful it must be recorded by the receiving computer." That led to the conclusion that:

... a user of e-mail had to understand that computers are, among other things, a message recording device and this his e-mail messages would be recorded on the computer of the person to whom the message was sent, he is properly deemed to have consented to the recording of those messages.

Id. at 676.

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<sup>4</sup> Townsend used the familiar test for privacy: a subjective belief the conversation was private coupled with the belief being objectively reasonable. Id. at 673-674. Defendant Patel did manifest the same subjective belief in this case as the defendant in Townsend. Whether it is objectively reasonable under the circumstances of a borrowed computer is a different matter. As noted, the host computer also recorded the chats. Is it objectively reasonable for a guest to have a greater expectation of privacy than his host does? For the reasons argued below on this aspect of the consent issue, this court also should find this was not a private conversation.

<sup>5</sup> Justice Bridge, joined by Justice Ireland, concurred in the result and would have found that the Privacy Act did not apply to communications between two computers. Id. at 680-685.

<sup>6</sup> Undersigned counsel was also counsel for the State in Townsend.

<sup>7</sup> Justice Sanders dissented on this issue. Id. at 685-687.

As to the instant messaging communications, the majority found it a closer question because a recipient might not understand that the computer could retain the information longer than the time it was present on the screen. Id. at 676-677. Noting that the instant messaging software warned users that the communications could be recorded and that Mr. Townsend appeared to be a sophisticated computer user, the majority concluded that the evidence supported the lower court rulings that he had impliedly consented to recording by the detective. Id. at 677-679.

For two reasons, the same result should follow here. The initial question is whose consent is operative. The computer owner set up his computer to record the instant messaging communications. Forensic analysis of the hard drive after defendant's arrest showed that the instant messaging between defendant and "Kim" was present on the computer. RP 107-110. Thus, both computers were recording the chats. Certainly the defendant's roommate knew that such communications could be recorded. Under Townsend, he would be deemed to have consented to the recording by the detective.

Why should the standard be any different for a person who uses his computer? Typically a guest has no greater privacy rights than his host. *E.g.*, State v. Thang, 145 Wn.2d 630, 638-639, 41 P.3d 1159 (2002) [host's consent to search valid against guest]; Minnesota v. Olson,

495 U.S. 91, 99, 109 L. Ed. 2d 85, 110 S. Ct. 1684 (1990) [host retains right to admit or exclude others]. Indeed, a guest's consent can not overcome his host's privacy rights. State v. Morse, 156 Wn.2d 1, 123 P.3d 832 (2005). "A guest's expectation of privacy may be vitiated by consent of another resident." State v. Thang, supra at 638. Similarly, this court should conclude that the guest user was bound by his host's consent to recording. If one were to accept defendant's argument here, his roommate would be civilly and criminally liable under the Privacy Act because his own computer recorded the defendant's chats with the detective.

The second reason why consent should be found is that defendant is not the unsophisticated user he claims to be. By his own testimony he had used the AOL software many times for chatting with young women. RP 150-151. He knew that he could scroll back up the screen to see earlier lines in the chat communication. RP 174. He also knew enough about the software to add "kimberleyanne420" to his "buddy list" that morning – a decision that he, not the computer software, had to make. RP 110-111. In school, he had instructed others on how to use internet chat rooms, something he considered both similar to and different from instant messaging. MRP 29-30. Defendant seems to know enough about operating the software that his claim to not understand that it could be recorded should be rejected.

For both reasons – the consent of his computer host and his own operative knowledge of the messaging software, defendant should be found to have consented to the recording of his chats with the detectives.

While the consent issue should be dispositive, this court can use this case as a vehicle to reconsider Townsend on this point. The statutory provision in question, RCW 9.73.030, states in part:

(1) . . . it shall be unlawful . . . to intercept or record any:

(a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication.

[emphasis supplied].

This provision clearly envisioned (and prohibited) use of a recording or transmitting device to intercept or record communications between individuals using their own communication devices. The plain language of the statute necessarily looks to a device other than that being used by the two communicators. The legislation prohibited use of a foreign device. Not only does the language of the statute support that construction, but the legislative history cited in Justice Bridge's concurring opinion is to the same effect. 147 Wn.2d at 681, 683-684.

That was also this court's original understanding of the Privacy Act. That is why, for instance, the telephone cases do not fall within the scope of this provision. Tipping a telephone so that a third person can hear, or listening in on an extension phone simply are not interceptions covered by this statute. That is because there is no additional "device" being deployed. State v. Corliss, 123 Wn.2d 656, 870 P.2d 317 (1994) (tipping receiver to officer); State v. Gonzales, 78 Wn. App. 976, 981-982, 900 P.2d 564 (1995), *review denied* 128 Wn.2d 1020 (1996) (officer answering phone call to defendant's house in his absence); State v. Bonilla, 23 Wn. App. 869, 598 P.2d 783 (1979) (officer listening on extension phone). As stated in Corliss: "Because there was no *device* used to record or transmit the conversation, we conclude that by the plain language of the statute, it is not applicable under the facts in this case. Our holding goes no further." 123 Wn.2d at 662 (emphasis in original). Under the statute, a device used to communicate is necessarily different from a device used to intercept or record.

It was Townsend that changed this understanding of what a "device" is under the Privacy Act. That decision, however, did not overrule Corliss. This court subsequently distinguished Corliss in this context in State v. Christiansen, 153 Wn.2d 186, 196, 102 P.3d 789 (2004), because there was no interception by the officer who was acting with the consent of

one of the parties to the telephone conversation.<sup>8</sup> While respondent, respectfully, questions the utility of that distinction in terms of defining the term “device,” that distinction puts the facts of Townsend more in line with those of Corliss than with those of Christensen. Here, too, there was “consent” of one of the parties to the communication and there was no third party interception. If the distinction means anything, it means that Townsend is wrong on this point.

If this court retains this case, it should reconsider the analytical foundation of Townsend’s “device” analysis. Either the Corliss line of cases or the Townsend line should be overruled. Respondent favors the latter.

Defendant’s privacy rights while using a borrowed computer were not violated. The trial court correctly denied the motion to suppress.

**B. THE EVIDENCE SUPPORTED THE VERDICT.**

The other issue presented by this case is also controlled by State v. Townsend. Defendant’s actions amounted to a substantial step towards committing second degree child rape.

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<sup>8</sup> In Christensen the court found that a mother using the base speaker to listen to a conversation between her daughter and the daughter’s boyfriend on a portable phone violated the Act. Notably, the prosecution conceded that there was an interception and this court indicated that the result may have been different but for that concession. Id. at 794.

This issue was expressly addressed in Townsend on the very same facts – detective Keller, posing as 13-year-old “Amber,” engaged in a sexually explicit instant messaging “chat” with a subject and set up a meeting. Mr. Townsend showed up at a hotel to meet Amber per their on-line chat. He was arrested and convicted of second degree child rape. 147 Wn.2d at 669-671. This court affirmed, finding that the evidence was sufficient to show a substantial step towards committing second degree child rape. Specifically, the opinion rejected the argument that one could not rape a fictitious child, noting that by statute factual impossibility is not a defense to a crime. Id. at 679.

Calling the Townsend analysis “problematic,” defendant argues that it is in conflict with earlier cases and was wrongfully decided since if defendant had in fact engaged in sexual relations with detective Keller, there would be no crime. His argument fails on several levels. First, he misreads the primary case upon which he relies, State v. Chhom, 128 Wn.2d 739, 911 P.2d 1014 (1996). That opinion did not hold that all of the elements of the completed crime of child rape are elements of an attempted child rape. Rather, the opinion held, consistent with Townsend<sup>9</sup> and virtually every other case under the modern attempt statute, that the

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<sup>9</sup> 147 Wn.2d at 679.

elements of an attempted offense are (1) intent to commit the named crime and (2) taking a substantial step towards doing so. Id. at 742-743.

The sole mention of the elements of the completed crime in Chhom opinion occurred when it noted the stipulation of the parties in the juvenile proceeding concerning the facts of the incident. Id. at 741. Chhom did not hold that in an attempted child rape prosecution the prosecutor must establish all of the elements of the completed offense. Indeed, such a requirement would negate any “attempt” prosecution. A prosecutor who could establish all of the elements of the completed offense would not have an “attempt” case.

The issue in Chhom was whether or not one could attempt a strict liability offense. Since “intent” is not inconsistent with a strict liability offense, Chhom determined that one could attempt the crime of child rape. Id. at 743. Along the way, Chhom distinguished the situation, exemplified by State v. Dunbar, 117 Wn.2d 587, 817 P.2d 1360 (1991) [one can not intend to act with manifest disregard], where “intent” is inconsistent with the mental state of the offense. In such a circumstance, there can not be an attempted offense. Id.

Townsend, thus, correctly applied the standard “attempt” elements to the crime of child rape – the intent to have intercourse with a child and a substantial step towards doing so. There is nothing

“problematic” about that part of the opinion. Townsend controls here. As did Mr. Townsend, Mr. Patel attempted to have sexual relations with someone he believed to be a child. This court ruled the evidence sufficient to support the conviction in Townsend. The same conclusion must follow in this case.

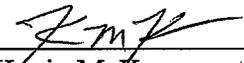
The evidence supported the trial court’s bench verdict. There was no error.

V.

#### CONCLUSION

For the reasons stated, the conviction should be affirmed.

Respectfully submitted this 12<sup>th</sup> day of March, 2007.

  
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